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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1959~~ 1960

No. ~~539~~ 13

EDWARD J. MEYER, ET AL., PETITIONERS,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 23, 1959
CERTIORARI GRANTED JANUARY 11, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1959~~ 1960

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., APRIL 4, 1960

[fol. a]

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA, Appellant,

v.

EDWARD J. MEYER, MARION E. MEYER and ALFRED M. SAPERSTON, Executors of the Estate of ALBERT F. MEYER, Appellees.

On Appeal From the Judgment of the United States District Court for the Western District of New York

Appendix for the Appellant

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

Civil No. 7572

EDWARD J. MEYER, MARION E. MEYER and ALFRED M. SAPERSTON, Executors of the Estate of ALFRED F. MEYER, Plaintiffs,

v.

THE UNITED STATES OF AMERICA, Defendant.

DOCKET ENTRIES

1957

Sep. 25. Filed complaint.

Sep. 25. Issued summons & 3 copies.

Sep. 25. Initial docket report made up.

Sep. 27. Filed summons—served Sep. 27/57.

Nov. 22. Filed stipulation & order extending time to answer to Dec. 26/57, entered order (Notice entry to Mr. Wile).

Dec. 16. Filed answer.

Dec. 27. Filed notice of issue of plff. Mar. 1958 term.

1958

Aug. 12. Filed stipulation of facts.

Oct. 6. Filed Decision & Judgment for plffs.—$2,339.72 with interest from Sep. 9/54 entered judgment Morgan, J. (Notice to Mr. Wile & Mr. Henderson.

Oct. 6. Final docket report made up.

Oct. 14. Filed notice of appeal of deft—(copy mailed Saperston, etc.)

Oct. 20. Filed bill of costs—$37.

[fol. 2]

1958

Dec. 4. Filed stipulation & order extending time to file record on appeal to Jan. 22/59—entered order—Burke, J. (Notice mailed Mr. Wile).

1959

Jan. 19. Original papers, clerk's certificate & docket entries mailed Clerk CCA.

IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS

The plaintiffs above named, by their attorneys Saperston, McNaughtan and Saperston, and the defendant above named, by its attorney, John O. Henderson, United States Attorney in and for the Western District of New York, hereby stipulate as follows:

1. Plaintiffs are executors of the Estate of Albert F. Meyer, who died September 14, 1952, having received Letters Testamentary as such executors from the Surrogate's Court of Erie County, New York, on October 9, 1952, and presently are acting as such executors.

2. On December 9, 1953, plaintiffs filed with the office of the District Director of Internal Revenue at Buffalo, New York, the estate tax return for the Estate of Albert F. Meyer and paid the tax therein shown to be payable in the amount of $16,770. The Director, upon auditing the return, made certain adjustments in the computation of the estate tax for the said estate and by giving effect to these adjustments determined a deficiency of $8,500.48 with interest from December 14, 1953, in the amount of $361.25, making a total of $8,861.73, which was paid by the plaintiffs to the District Director of Internal [fol. 3] Revenue at Buffalo, New York, as follows: $8,500.48 on August 31, 1954, and $361.25 on October 26, 1954.

3. The total gross estate reported by plaintiffs on said federal estate tax return amounted to $313,764.46. Included in Schedule M of the estate tax return as part of the property passing to the surviving spouse were the proceeds of two insurance policies totaling $30,207.10. This amount included the proceeds from an insurance policy on decedent's life issued by Northwestern Mutual Life Insurance Company, Policy No. 3212835, (originally identified as Policy No. 3056279), payable to Marion E. Meyer, wife of decedent, in the amount of $25,187.50, and the proceeds of an insurance policy on decedent's life issued by John Hancock Mutual Life Insurance Company, Policy No. 2035894

payable to Marion E. Meyer in the amount of $5,019.60. Proceeds of these policies were included in the gross estate as items 3 and 8, respectively, of Schedule D of the estate tax return. Photostatic copies of each of the policies of insurance are attached hereto, marked Exhibit *1* and *2*, and made a part of this stipulation. Photostatic copies of Schedule D and M are attached hereto, marked Exhibit *3*, and made a part of this stipulation.

4. The decedent filed a Nomination of Beneficiary and Election of Settlement Option dated December 4, 1940, for each of the above mentioned policies. The settlement option for the John Hancock policy provided for the payment of the proceeds of the policy in 20 annual installments in equivalent monthly payments, to the decedent's wife, Marion E. Meyer, if living, and thereafter during her lifetime, but if the decedent's wife was not living at his death, the installments were to be paid to the decedent's daughter, Shirley A. Meyer, in the same manner. In the event of the death of said wife after becoming entitled to payment and [fol. 4] before payment in full of said 20 annual installments, any of the said 20 installments or monthly portions thereof then remaining unpaid, was to be paid, as they became payable, to said daughter. In the event of the death of the last survivor of the insured, his said wife and his said daughter, before payment in full, the amount payable or the commuted amount of any of said 20 annual installments or monthly portions thereof then remaining unpaid, was to be paid in one sum to the executors or administrators of such last survivor. The settlement option for the Northwestern policy provided for the payment of the proceeds of the policy in 240 stipulated monthly installments in accordance with Option C of that policy to Marion E. Meyer, wife of the insured, however, in the event of the death of Marion E. Meyer while receiving settlement under Option C, the insured's daughter, Shirley A. Meyer was to continue under such option in accordance with its terms as to the stipulated installments remaining unpaid, if any. Each option was, in effect, at decedent's death. Copies of the options of payment contained in each of the policies are attached hereto as Exhibits 4 and 5 and made a part of this stipulation.

5. In directing that the proceeds payable at his death be paid to his wife, Marion E. Meyer, if surviving, in the manner described in paragraph 4, the decedent Albert F. Meyer, invoked option C of the optional modes of settlement contained in the Northwestern Mutual Life Insurance Company policy of insurance. The decedent invoked Option Three (3) of the optional modes of settlement contained in the John Hancock Mutual Life Insurance Company policy of insurance.

6. Decedent was survived by his wife, Marion E. Meyer, and his daughter Shirley Meyer. At the time of Albert F. Meyer's death, the age of Marion E. Meyer, his surviving wife, to her nearest birthday was 42.

[fol. 5] 7. On the basis of the calculations used by the Northwestern Mutual Life Insurance Company to determine the amount of the monthly installments, of the total proceeds in the amount of $25,187.50, the sum of $17,956.41 was necessary to provide the monthly income in the amount of $94.71 for 20 years certain and $7,231.09 was required to provide a monthly income thereafter for the life of the surviving spouse. A copy of the letter from the Northwestern Mutual Life Insurance Company stating the facts relating to such computations is attached hereto and marked Exhibit 6, and made a part of this stipulation.

8. On the basis of the calculations used by the John Hancock Mutual Life Insurance Company to determine the amount of the monthly installments, of the total proceeds in the amount of $5,019.60, the sum of $4,012.24 was necessary to provide monthly income for 20 years certain and $1,007.36 was required to provide the monthly income thereafter for the life of the surviving spouse. A copy of the letter from the John Hancock Mutual Life Insurance Company stating the facts relating to such computations is attached hereto and marked Exhibit 7, and made a part of this stipulation.

9. The policy of insurance referred to above issued by the Northwestern Mutual Life Insurance Company provides in paragraph 7 of its Special Provision Relating To Settlement When This Policy Becomes Payable that "(b)enefits

under Option "C" shall not be subject to commutation and withdrawal."

10. The Nomination of Beneficiary and Election of Settlement Options under the policies of insurance issued by John Hancock Mutual Life Insurance Company and the Northwestern Mutual Life Insurance Company referred to above provide that the benefits accruing under said policy and under the agreement, shall not be transferable, nor subject to commutation or encumbrances, nor to legal [fol. 6] process except in an action to recover for necessaries.

11. Neither of the above referred to policies provides, and the decedent did not request, that there be any segregation of the proceeds of the policy between the amounts computable for the term certain and the amounts computable for the funding of the contingent life annuity. Both of the policies provide that the policy and the application therefor constitute the entire contract between the parties.

12. There is no dispute that the $17,956.41 computed as the amount required under the policy of insurance issued by the Northwestern Mutual Life Insurance Company to provide monthly payments during the 20 years certain period and the $4,012.24 computed as the amount required under the policy of insurance issued by the John Hancock Mutual Life Insurance Company to provide monthly payments during the 20 years certain period are nondeductible "terminable interests" within the meaning of Section 812 (e)(1)(B) of the Internal Revenue Code of 1939, and no claim is made for allowance of the marital deduction with respect to such amounts.

13. A claim for refund of estate taxes in the amount of $2,339.72, alleged by the plaintiffs to have been overpaid, was filed by the plaintiffs in the office of the District Director of Internal Revenue at Buffalo, New York, on April 26, 1957. Said claim was based upon the contention that the amount of $8,238.45 consisting of portions of each of the two life insurance policies referred to above and taken out by the decedent on his own life and computed by the insurance companies for the funding of the contingent

life annuities to be paid to Marion E. Meyer are in the category which qualifies for the marital deduction.

[fol. 7] 14. On September 19, 1957, the District Director of Internal Revenue at Buffalo, New York, disallowed the plaintiffs' refund claim and notified plaintiffs by registered mail.

15. If the amount totaling $8,238.45 computed by the insurance companies to the funding of the contingent life annuities to be paid to Marion E. Meyer under the provisions of the policies are held to qualify as a part of the marital deduction allowed by Section 812(e)(1) of the Internal Revenue Code of 1939, said marital deduction will amount to $125,543.27 instead of $117,304.82 as determined by the District Director of Internal Revenue.

16. On the basis of a marital deduction of $125,543.27, the estate tax liability of the estate of Albert F. Meyer would be reduced by the amount of $2,339.72 from the liability as finally determined by the District Director of Internal Revenue.

Dated: Buffalo, New York, August 4, 1958.

Saperston, McNaughtan & Saperston, By: Richard H. Wile, one of the partners, Attorneys for Plaintiffs.

John O. Henderson, United States Attorney, By: Frederick W. Danforth, Jr., Assistant U.S. Attorney, Attorney for Defendant.

[fol. 8]

EXHIBIT 1 TO STIPULATION

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
OF MILWAUKEE, WISCONSIN

* * * * * * *

SPECIAL PROVISIONS RELATING TO SETTLEMENT WHEN
THIS POLICY BECOMES PAYABLE

* * * * * * *

Installments Continuous for Life

10. OPTION C: To have the whole or any designated part of the net proceeds paid in either 120, 180 or 240 stipulated monthly minimum installments of the amount stated in the Continuous Installment Table corresponding to the sex and the age of the then beneficiary on the date of payment of the first of such installments, provided that if such beneficiary shall survive to receive the number of stipulated installments selected, payments of like amount and frequency shall continue during the lifetime of the beneficiary. The table shall apply pro rata per $1000 of the amount to be so paid, the first installment being payable as of date of death of Insured or the date of election if subsequent. If there be two more beneficiaries the amount payable, unless otherwise directed by the designator, shall be divided into a corresponding number of equal parts and the installments to each beneficiary will be similarly determined according to age and sex by the Continuous Installment Table. Payment under this option shall be subject to satisfactory proof of the age of the beneficiary thereunder.

DD. 1, 2, 3 & 9.

[fol. 9]

EXHIBIT 2 TO STIPULATION

THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS

* * * * * * *

OPTIONAL METHODS OF SETTLEMENT

* * * * * * *

Option 3—Life Income. Equal payments for a stipulate number of years and thereafter as long as the payee shall live, the amount of such payments to be upon the age at nearest birthday of the payee at the date of maturity of the policy.

IN UNITED STATES DISTRICT COURT

Decision and Judgment—October 3, 1958

The above entitled action was submitted to this Court upon stipulated facts and briefs.

FINDINGS OF FACT

1. Plaintiffs are executors of the Estate of Albert F. Meyer, who died September 14, 1952, having received Letters Testamentary as such executors from the Surrogate's Court of Erie County, New York, on October 9, 1952, and presently are acting as such executors.

2. This action arises under the Internal Revenue Code of the United States as amended.

3. On December 9, 1953, the executors filed the Federal Estate return with the District Director of Internal Revenue in Buffalo, New York, showing a tax due in the sum of $16,770.00. The return was audited and the Director determined a deficiency in the amount of $8,500.48, with [fol. 10] interest from December 14, 1953 in the amount of $361.25; making a total assessment of $8,861.73, which was paid as follows: $8,500.48 on August 31, 1954 and $361.25 on October 26, 1954.

4. The total gross estate reported by plaintiffs on said federal estate tax return amounted to $313,764.46. Included in Schedule M of the estate tax return, as part of the property passing to the surviving spouse, were the proceeds of two insurance policies totaling $30,207.10. This amount included the proceeds from an insurance policy on decedent's life issued by Northwestern Mutual Life Insurance Company, Policy No. 3212835, (originally identified as Policy No. 3056279) payable to Marion E. Meyer, wife of decedent, in the amount of $25,187.50, and the proceeds of an insurance policy on decedent's life issued by John Hancock Mutual Life Insurance Company, Policy No. 2035894, payable to Marion E. Meyer in the amount of $5,019.60. Proceeds of these policies were included in the gross estate as items 3 and 8, respectively, of Schedule D of the estate tax return.

5. The decedent filed a Nomination of Beneficiary and Election of Settlement Option dated December 4, 1940, for each of the above mentioned policies. The settlement option for the John Hancock policy, hereinafter referred to as option Three (3), provided for the payment of the proceeds of the policy in 20 annual installments in equivalent monthly payments to decedent's wife, Marion E. Meyer, if living, and thereafter during her lifetime, but, if the decedent's wife was not living at his death, the installments were to be paid to the decedent's daughter, Shirley A. Meyer, in the same manner. In the event of the death of said wife after becoming entitled to payment and before payment in full of said 20 annual installments, any of the said 20 installments or monthly portions thereof then re- [fol. 11] maining unpaid, were to be paid, as they became payable, to said daughter. In the event of the death of the last survivor of the insured, his said wife and his said daughter, before payment in full, the amount payable, or the commuted amount of any of said 20 installments or monthly portions thereof then remaining unpaid, were to be paid in one sum to the executors or administrators of such last survivor. The settlement option for the Northwestern policy, hereinafter referred to as Option C, provided for the payment of the proceeds of the policy in 240

stipulated monthly installments to Marion E. Meyer, wife of the insured. However, in the event of the death of Marion E. Meyer while receiving settlement under Option C, the insured's daughter, Shirley A. Meyer, was to receive payment under such option in accordance with its terms as to the stipulated installments remaining unpaid, if any. Each option was in effect at decedent's death.

6. Decedent was survived by his wife, Marion E. Meyer, and his daughter, Shirely [*sic*] A. Meyer. At the time of Albert Meyer's death, the age of Marion E. Meyer, his surviving wife, to her nearest birthday was 42.

7. On the basis of the calculations used by the Northwestern Mutual Life Insurance Company to determine the amount of the monthly installments in the amount of $25,187.50, the sum of $17,956.41 was necessary to provide the monthly income in the amount of $94.71 for 20 years certain, and $7,231.09 was required to provide a monthly income thereafter for the life of the surviving spouse.

8. On the basis of the calculations used by the John Hancock Mutual Life Insurance Company to determine the amount of the monthly installments of the total proceeds in the amount of $5,019.60, the sum of $4,012.24 was neces- [fol. 12] sary to provide monthly income for 20 years certain, and $1,007.36 was required to provide the monthly income thereafter for the life of the surviving spouse.

9. The Northwestern and John Hancock policies provide that benefits accruing under the settlement option and policy of insurance shall not be transferable, nor subject to commutation or encumbrances, nor to legal process, except in an action to recover for necessaries.

10. Neither of the above referred to policies provides, and the decedent did not request, that there be any segregation of the proceeds of the policy between the amounts computable for the term certain and the amounts computable for the funding of the contingent life annuity. Both of the policies provide that the policy and the application therefor constitute the entire contract between the parties.

11. There is no dispute that the $17,956.41 computed as the amount required under the policy of insurance issued by the Northwestern Mutual Life Insurance Company to provide monthly payments during the 20 years certain period and the $4,012.24 computed as the amount required under the policy of insurance issued by the John Hancock Mutual Life Insurance Company to provide monthly payments during the 20 years certain period are nondeductible "terminable interests" within the meaning of Section 812 (e)(1)(B) of the Internal Revenue Code of 1939, and no claim is made for allowance of the marital deduction with respect to such amounts.

12. A claim for refund of estate taxes in the amount of $2,339.72, alleged by the plaintiffs to have been overpaid, was filed by the plaintiffs in the office of the District Director of Internal Revenue at Buffalo, New York, on April 26, 1957. Said claim was based upon the contention that the amount of $8,238.45, consisting of portions of each of [fol. 13] the two life insurance policies referred to above and taken out by the decedent on his own life and computed by the insurance companies for the funding of the contingent life annuities to be paid to Marion E. Meyer, are in the category which qualifies for the marital deduction.

13. On September 19, 1957, the District Director of Internal Revenue at Buffalo, New York, disallowed the plaintiffs' refund claim and notified plaintiffs by registered mail.

Discussion

The issue involves the determination whether the $8,238.45 computed by the insurance companies to the funding of the contingent life annuities to be paid to Marion E. Meyer qualifies as part of a marital deduction allowed by Section 812(e)(1) of the Internal Revenue Code of 1939 as amended; (1) Title 26 U.S.C., Section 812.

Section 812(e) allows a marital deduction under certain circumstances. An interest passing to the surviving spouse does not qualify for the deduction when it is a "terminable" interest. There is a terminable interest where, upon the

occurrence of an event or contingency, the interest of the surviving spouse will terminate and an interest in such property passes from the decedent to some other person who might possess or enjoy some part of the property after the termination of the surviving spouse's interest.

The Government argues as follows:

Payment under the options were payable in monthly installments for 20 years certain to the decedent's wife or to his daughter, then surviving, if his wife died. After 20 years, monthly installments were payable to the wife for life. However, should the wife die during the 20 year period, the interest would terminate and pass to the [fol. 14] daughter. Such an interest to the daughter is a nondeductible "terminable" interest, if the entire insurance proceeds constitute one property within the meaning of Section 812(e). The entire proceeds constitute one property within the purview of Section 812(e) because the term property is used in that section in a comprehensive sense. The entire proceeds of $30,207.10 which are usable to satisfy her interest constitute the property for purposes of Section 812(e). The Government contends that there is no basis in this case for a division of the insurance proceeds in order to determine the marital deduction. Since the right to all the installments under each policy was one property, and since persons other than the surviving spouse might possess or enjoy some part of the property after the surviving spouse's interest terminated, the Government contends that no part of the property qualified for the marital deduction.

The taxpayers take the position that there were really two properties in the policies, even though not specifically segregated, and that any contingent interest passing to the decedent's daughter was only in that portion of the proceeds which are admittedly terminable interests and taxable, but that the daughter had no interest whatsoever in that portion of the proceeds of the policies required to fund the contingent life annuities which could be only for the benefit of the surviving spouse.

In re Reilly's Estate, 239 F. 2d 797 is identical with the case at bar with the exception that *In re Reilly's Estate*,

the certain payments, but not the contingent payments, were to be increased by any surplus additions as might be awarded by the Board of Trustees of the insurance company. The Circuit Court said at Page 800, "The simple inquiry here is to ascertain whether a division of the pro- [fol. 15] ceeds into two separate properties was accomplished. So long as the insured was alive the two potential interests were part of the one plan, each depending on the other and the survival of the insured for their amounts, their beneficiaries and whether they would ever exist. With the happening of the condition, the death of the insured, those two bundles of rights came into being entirely separate and independent. Their respective amounts had to be computed out of the total proceeds by the insurer's formula but that relationship was mechanical rather than casual. The computation was purely actuarial, depending only on the age of the surviving spouse which was fixed for computation purposes on the happening of the said condition. The death of the decedent was the moment of the transfer; other than the formalities of filing the certificate of death and making the necessary calculation, the division of the two interests was complete and the rights of the parties then fixed.

"Thereafter the amount of the ten-year certain payments could not be affected by the annuity for life; and the life annuity did not flow from nor could it be affected by the payments certain. The rights under one were not tied in any way to the rights under the other. A person other than the spouse could succeed to one; no one but the spouse could be paid any part of the other. The mere fact that the two interests derived from the same contract is insufficient to fuse these independent properties.

"Under the option selected the insurer must and in fact did separate the proceeds into two separate funds upon the death of the decedent. Thereafter, each part of the contract was funded differently by the insurer, e.g., each policy provided that the certain payments, but not the contingent payments, were to be increased by any surplus additions.

[fol. 16] "There is nothing in Section 812(e) evincing intent that this contingent future life annuity to the sur-

viving spouse alone be taxed in the estate of the spouse first to die. Nor is such purpose indicated in the legislative history."

CONCLUSIONS OF LAW

1. This court has jurisdiction of the subject matter and the parties to this controversy.

2. Shirley A. Meyer had no interest under any set of circumstances of the funding of the contingent life annuities to be paid to Marion E. Meyer.

3. The sum of $7,231.09 set aside by Northwestern Mutual Life Insurance Company and $1,007.36 by John Hancock Mutual Life Insurance Company to fund monthly payments to Marion E. Meyer after the 20 years and thereafter for the life of the surviving spouse qualify for the marital deduction under Section 812(e) of the Internal Revenue Code, Title 26 U.S.C., Section 812. *In re Reilly's Estate*, 239 F. 2d 727.

4. This court finds in favor of the plaintiffs against the Government. The marital deduction is increased by $8,238.54 to $125,543.27. On the basis of the stipulated facts, the estate tax liability of the Estate of Albert F. Meyer is reduced by $2,339.72.

Plaintiffs are granted a judgment against the Government for $2,339.72 with interest from September 9, 1954. It is so ordered.

Justin C. Morgan, United States District Judge.

Dated: October 3, 1958

[fol. 17]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—October 14, 1958

SIRS:

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on October 3, 1958.

Dated: Buffalo, New York, October 14, 1958.

Yours, etc.

John O. Henderson, United States Attorney, Western District of New York, Attorney for Defendant, Office and Post Office Address, 502 United States Courthouse, Buffalo 2, New York.

By: Frederick W. Danforth, Jr., Assistant United States Attorney.

To: Saperston, McNaughtan & Saperston, Attorneys for Plaintiffs, Office and Post Office Address, 815 Liberty Bank Building, Buffalo 2, New York.

[fol. 18]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 302—October Term, 1958.

Argued June 2, 1959

Docket No. 25501

EDWARD J. MEYER, MARION E. MEYER and ALFRED M. SAPERSTON, Executors of the Estate of ALBERT F. MEYER, Appellees,

—v.—

UNITED STATES OF AMERICA, Appellant.

Before: Clark, Chief Judge, Lumbard and Waterman, Circuit Judges.

Appeal by the United States from a final judgment of the District Court for the Western District of New York, Justin C. Morgan, *J.*, 166 F. Supp. 629, awarding appellees $2,339.72 on their claim of overpayment of estate taxes on the ground that an estate is entitled to an estate tax marital deduction, §812(e)(1)(A), Internal Revenue Code of 1939, for that portion of the total proceeds of life insurance on the life of decedent which would be required to fund a contingent life annuity for the surviving spouse from and after twenty years, when the whole proceeds are held by the insurer under a settlement option of the policy the terms of which provide that the surviving spouse [fol. 19] shall receive monthly payments for the remainder of her life, but that if she should die before the expiration of twenty years then the decedent's daughter shall receive the payments until twenty years have elapsed. Reversed.

John J. Pajak, Department of Justice, Washington, D. C. (Charles K. Rice, Assistant Attorney General, Lee A. Jackson and Robert N. Anderson, Department of Jus-

tice, Washington, D. C., John O. Henderson, United States Attorney and William I. Schapiro, Assistant United States Attorney, Western District of New York, Buffalo, N. Y., on the brief), for appellant.

Richard H. Wile, Buffalo, N. Y. (Saperston, McNaughtan & Saperston, on the brief), for appellees.

OPINION—September 4, 1959

Lumbard, Circuit Judge:

This appeal by the United States from a final judgment of the District Court for the Western District of New York, Justin C. Morgan, *J.*, presents the single question whether an estate is entitled to an estate tax marital deduction, §812(e)(1)(A), Internal Revenue Code of 1939, for a portion of the proceeds of a policy of life insurance upon the life of the deceased spouse when the whole proceeds are held by the insurer under a settlement option of the policy, the terms of which provide that the surviving spouse shall receive monthly payments for the remainder of her life, but that if she should die before the expiration of twenty years then the decedent's daughter shall receive the payments until twenty years have elapsed. The district court found that that portion of the total proceeds allocable [fol. 20] to the funding of a contingent life annuity from and after twenty years after the decedent's death qualified for the marital deduction. It was agreed by the parties that in no event would the portion of the proceeds necessary to fund the twenty years of monthly payments certain qualify for the deduction.

We hold that no part of the proceeds so held by the insurer qualifies for the estate tax marital deduction, and accordingly we reverse the decision below.

The relevant facts are stipulated and may be briefly stated. The decedent held two life insurance policies on his own life, the total proceeds of which at his death were $30,207.10. Both policies were payable to his wife, Marion E. Meyer. The decedent elected substantially identical payment options under the policies prior to his death on

September 14, 1952.[1] By the terms of the option selected in each policy his surviving wife was assured of monthly payments for the remainder of her life; but by the terms of [fol. 21] each it was also agreed that 240 monthly payments would be made in any event and that they would be made to designated beneficiaries in the event that although the decedent's wife was living at his death, she did not survive to receive them all. In both policies the decedent's daughter, Shirley A. Meyer, was the person primarily designated to receive the guaranteed payments in the event of the death of her mother in less than twenty years. Both decedent's wife and daughter survived him.

It was further stipulated and found that upon decedent's death the insurance companies concerned separately determined as a matter of their business practice the portion of the total proceeds required to fund the twenty years of payments certain, and both determined the sum required to fund the contingent life annuity for Marion Meyer

---

[1] The options elected respectively provided:

[1] "10. Option C:. To have the whole or any designated part of the net proceeds paid in either 120, 180 or 240 stipulated monthly minimum installments of the amount stated in the Continuous Installment Table corresponding to the sex and the age of the then beneficiary on the date of payment of the first of such installments, provided that if such beneficiary shall survive to receive the number of stipulated installments selected, payments of like amount and frequency shall continue during the lifetime of the beneficiary. The table shall apply pro rata per $1000 of the amount to be so paid, the first installment being payable as of date of death of Insured or the date of election if subsequent. If there be two more beneficiaries the amount payable, unless otherwise directed by the designator, shall be divided into a corresponding number of equal parts and the installments to each beneficiary will be similarly determined according to age and sex by the Continuous Installment Table. Payment under this option shall be subject to satisfactory proof of the age of the beneficiary thereunder."

* * * * * * *

[2] "Option 3—Life Income. Equal payments for a stipulated number of years and thereafter as long as the payee shall live, the amount of such payments to be upon the age at nearest birthday of the payee at the date of maturity of the policy."

from and after twenty years. The refund sought and recovered by the executors was $2,339.72, which is the decrease in the estate tax which would result from increasing the marital deduction by $8,238.54, the total amount determined by the two insurers as required to fund the contingent life annuity. Neither insurance contract provided, and the decedent did not request, that there be any segregation of the proceeds of the policy between the amounts computable for the term certain and the amounts computable for funding the contingent life annuity. Both of the policies provide that the policy and the application therefor constitute the entire contract between the parties.

On this appeal appellees rely exclusively on the authority of *In re Reilly's Estate*, 239 F. 2d 797 (3 Cir. 1957) where it was determined that insurance proceeds held under what are for present purposes substantially identical contracts could be divided into two "properties" as that term is used in §812(e)(1)(B)(i) and (ii). As a consequence it was held that the amount needed to fund the contingent [fol. 22] life annuity qualified for the marital deduction because, although "terminable" within the meaning of the preamble to §812(e)(1)(B), no "interest" in that separate property passed to any person other than the surviving spouse so that the conditions of §812(e)(1)(B)(i) and (ii) for disqualification of the gift to the spouse were not fulfilled. No other court of appeals appears to have considered this question.

Since appellee concedes that the wife's interest in the portion of the total proceeds necessary to fund the payments for twenty years certain is disqualified, the sole question is whether, as the Third Circuit held, the proceeds may be separated into two separate properties. Section 812(e)(1)(A) and (B) distinguish between property and an interest in property, and the Senate Committee Report, S. Rep. 1013 (part 2), 80th Cong., 2d Sess. (1948), expressly comments upon the distinction:

> "The terms 'interest' and 'property' as used in section 812(e) have separate and distinct meanings. The term 'property' is used in a comprehensive sense and includes all objects or rights which are susceptible of

ownership. The term 'interest' refers to the extent of ownership by the surviving spouse or other person, of particular property. For example, if the surviving spouse is specifically devised an estate for her life in a farm, the 'interest' passing to her is the life estate, and the 'property' in which such interest exists is the farm. Thus, in the case of a bequest, devise, or transfer of an interest which may be satisfied out of, or with the proceeds of, any property of the decedent's general estate or of a trust, the interest so bequeathed, devised, or transferred is an interest in any and all of such property."

* * * * * * * * *

[fol. 23] "As previously stated, it is necessary for the purposes of section 812(e)(1) to distinguish between an interest in property and the property in which such interest is an interest. Thus if the decedent devises Blackacre to his wife for life with remainder to X, then X has an interest in the property (Blackacre) in which the surviving spouse has an interest. If the principal value of Blackacre was a coal mine which may be expected to be exhausted during the surviving spouse's life, nevertheless both the surviving spouse and X have an interest in the property, which is Blackacre. * * * In the case of a trust or fund, the income beneficiaries and the persons who may receive any part of the corpus have an interest in the property represented by the assets of the trust or fund as of the date of the decedent's death."

Although we think these examples speak clearly to the instant case to define the insurance proceeds as a single fund in which the wife has been granted a life estate with a remainder in the daughter, it is at least arguable on the basis of this alone that, as the Third Circuit found, the proceeds may be divided and the wife's interest treated as twofold: a life estate in one property, the payments certain, and a contingent life annuity in the other. But such doubt as we might otherwise entertain on this question is resolved by another portion of the same report in which

in a specific example the present situation is expressly dealt with. After dealing at length with the provisions of (B) the Report states:

> "The same principles apply in the case of insurance proceeds and annuity contracts, as illustrated by the following examples:
>
> [fol. 24] *Example (1).* The entire proceeds of an insurance policy on the life of the decedent are payable to the surviving spouse and the value of such proceeds is included in determining the value of the gross estate. *A marital deduction is allowed* with respect to the value of the proceeds *because no person other than the surviving spouse has an interest in the proceeds. The result will be the same whether such proceeds* are payable in a lump sum; are payable in installments to the surviving spouse, her heirs, or assigns, for a term; or *are payable to the surviving spouse for her life with no refund of the undistributed proceeds or with such a refund to her estate.* * * *." (Emphasis added.)

This example makes it plain that "proceeds" is identical with "property" at least in the situation treated by it, since the spouse's "interest" is referred to as an interest in the "proceeds" and not in a portion of them; and all possible doubt on this score is resolved by the specific example of a refundable life annuity in the entire proceeds given to the wife, in which instance it is clearly stated that the wife's interest will qualify *if* the refund is to be made to her estate.

The next subsequent example deals with annuities, and, if that is possible, even more clearly defines the contract creating the annuity as a single property:

> "*Example (2).* The decedent during his lifetime purchased an annuity contract under which the annuity was payable during his life *and then to his spouse during her life if she survived him.* The value of the interest of decedent's surviving spouse in such contract at the death of the decedent is included in determining the value of his gross estate. *A marital*

deduction is allowed with respect to the value of such [fol. 25] interest so passing to the decedent's surviving spouse *inasmuch as no other person has an interest in the contract.* If upon the death of the surviving spouse the annuity payments were to continue for a term to her estate, or the undistributed portion thereof was to be paid to her estate, the deduction is nevertheless allowable with respect to such entire interest. *If, however, upon the death of the surviving spouse the payments are to continue to another person (not through her estate) or the undistributed fund is to be paid to such other person, no marital deduction is allowable inasmuch as an interest passed from the decedent to such other person.*" (Emphasis added.)

Thus considered both as a dedication of the entire proceeds to the creation of a refundable life annuity with the refund in someone other than the wife's estate, or considered as the dedication of the proceeds to the purchase of a refundable life annuity, the present case falls squarely within unambiguous examples given by the responsible Senate Committee.

Even if we assume that had the contract provided for the segregation of the separate funds they could then have been considered separate properties, it is stipulated here and the contracts reveal that no such segregation was provided for. In a similar situation we have rejected the view that what might have been accomplished at the outset, but was not, ought nevertheless to be regarded as having been done. See *Hoffenberg* v. *Commissioner*, 223 F. 2d 471 (2 Cir. 1955), aff'g 22 T. C. 1185 (1954).

We do not agree with the Third Circuit that the example given in the Report of a gift to the decedent's wife and daughter as tenants in common of the decedent's interest in a patent, as to which it is clearly stated that the wife's interest qualifies for the estate tax marital deduction, is [fol. 26] in any way inconsistent with the view that the patent is a single property, or that, conversely, the example may be said to support the view that the patent, by virtue of the gift, became two separate properties. The Report expressly states that the interest given to the wife qualifies

because it does not come within §812(e)(1)(B)(ii) although it is a terminable interest under (i). The reason it does not come within (ii) is we think that the daughter's possession and enjoyment of her interest in the single property take place at once, and not "after" the termination of the wife's terminable interest, and not because there were two properties created.

We are similarly unpersuaded by resort to the analogy of §812(e)(1)(G), which creates an exception from the terminable interest rule when, *inter alia*, the surviving spouse is given a power of appointment over the residue of the proceeds. While it is true, as the Third Circuit noted, that Regulation 105, §81.47(a)(d)(2) contemplates the division of insurance proceeds into separate funds held by the insurer, it cannot be said that the Regulation contemplates that the resulting funds may be considered to be separate properties. It is perfectly consistent with the Regulation that it applies to an instance, such as that of a tenancy in common between the surviving spouse and another, in which although two interests are thus created in the single property, the wife's interest, because of §812(e)(1)(G), is not disqualified. For example, if the surviving spouse received a life estate in one-half the proceeds with a power to appoint the remainder, and another person received one-half outright, the wife's interest would qualify if the life estate and the power met the requirements of §812(e)(1)(G), while without (G) it may be assumed that it would not.

Moreover, even if the Regulation might be said to be in some manner inconsistent with the view we have taken, [fol. 27] we would not accord it great weight. It interprets and gives effect to a special exception to the terminable interest rule for powers of appointment over the proceeds of life insurance and annuity contracts. It would be hazardous, in the face of the convincing evidence for the contrary result, to reason in the present case from a policy concerning powers of appointment, especially because the statute in part (G) conditions the granting of the exception for powers of appointment on the fulfillment of special requirements not otherwise present. Thus, *inter alia*, payments to the surviving spouse under the option must com-

mence not later than thirteen months after the decedent's death, a limitation conspicuously lacking here.

Reversed.

WATERMAN, Circuit Judge (dissenting):

I cannot join with the majority in their disposition of this appeal. I would affirm the result below and would follow, as did the district court, 166 F. Supp. 629 (WDNY 1958), the lead of the Third Circuit in *In Re Reilly's Estate*, 239 F. 2d 797 (3 Cir. 1957).

It is, and was stated in one of the exhibits attached to and made part of the parties' stipulation to be, the accounting and actuarial practice of the life insurance industry to do exactly what the companies here did. Upon the death of Mr. Meyer, under the settlement options he chose, each of the two companies set aside two distinct funds—each company estimating the amounts needed in each fund by reference to Mrs. Meyer's life expectancy as set forth in the applicable Mortality Table. In each case, one of these funds, the first one, was to provide payments certain for twenty years. If Mrs. Meyer died during this twenty year period the payments certain were to be made [fol. 28] to another beneficiary. The status of these two first funds is not involved in this appeal. It is agreed they do not qualify for the estate tax marital deduction. In each case the other fund, the second one, was set aside to finance payments payable only to Mrs. Meyer for as long as she might live after the expiration of the twenty years and after the exhaustion of the first fund. These payments were not to begin until the twenty-year period had elapsed. There was no contingent beneficiary. If Mrs. Meyer died during the twenty year period the insurance companies would each pocket the full amount of this second fund. If she died after she began to draw against the fund, but before it had been exhausted, each company would pocket the unexhausted sums. On the other hand, if Mrs. Meyer lived longer than her life expectancy and thereby exhausted the second fund the insurance companies were obligated to continue to pay her out of company money the agreed payments until her death.

It seems clear that the money needed to fund the payments for twenty years certain, and that needed to fund the continuing life long payments, were necessarily required to be kept separate and constituted separate entities. They were for different purposes, purposes contemplated by Mr. Meyer when he chose the particular settlement option that he chose, and their separation was required in order that neither Mr. Meyer nor the companies be disadvantaged in the execution of the settlement plan. Therefore, of what possible materiality can it be that this segregation of funds was not spelled out in the settlement contract? Or that Mr. Meyer didn't specifically request a division?

To be sure, they were both settled for the primary purpose of providing installment payments to the surviving spouse during her lifetime. But there the similarity ceases and the dissimilarity is so marked that I think it error to [fol. 29] consider that in each case these two funds were but one property. If the interest of the surviving spouse in the property constituting the first fund should happen to terminate or fail by her death the balances remaining in that fund could pass without consideration to the contingent beneficiary. But the second fund was not so settled. While the interest of the surviving spouse in the property constituting the second fund might also terminate or fail by her early death those balances would pass for "an adequate and full consideration in money or money's worth" to the insurance companies with whom the settlor had bargained on the chance that his widow would outlive her life expectancy and receive excess payments.

Hence I would hold that the portions of the proceeds of Mr. Meyer's insurance policies that by contract with him were set aside to fund payments to Mrs. Meyer after the twenty-year period had elapsed qualified for the allowance of the estate tax marital deduction. I believe this result is consistent with the purpose of Section 812(e)(1)—to make the tax treatment of married persons in community property and non-community property states more nearly uniform—and surely the arrangement with which we are dealing does not provide an avenue for abuse of the marital deduction provision. Consequently, since "[i]n expounding

a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy," *United States* v. *Boisdore's Heirs*, 8 How. 113, 122 (1849); *Mastro Plastics Corp.* v. *National Labor Rel. Bd.*, 350 U. S. 270, 285 (1956); *National Labor Relations Bd.* v. *Lion Oil Co.*, 352 U. S. 282, 288 (1957), I would affirm the court below.

I interpret the difference between my colleagues and me to turn on the fact that they are unwilling to consider as done what actually was done. They believe that, because there was no specific contract authorizing segregation, it is [fol. 30] improper for estate tax purposes to divide the insurance proceeds into two funds. I am sure that if they agreed with me that two funds are permissible, they also would agree that the estate of Mr. Meyer would be entitled to the benefit of the marital deduction to the extent of the funds before us on this appeal. The specific wording of the Code's applicable provisions so provide. See 1954 I. R. C. §2056(b)(1)(A) and (B); 1939 I. R. C. §812(e)(1)(B)(i) and (ii). *See also* Reg. 105, §81.47a(b)(2) and (3). The benefits of the marital deduction are deniable to a terminable interest only where a remainder interest in the entire property passes to some person other than the surviving spouse for less than adequate consideration, and this other person may thereupon possess or enjoy the remainder interest after the termination of the wife's present interest. I think we would all agree that unless there are additional rights created in a property entity for the benefit of third parties the interests passing to the surviving wife in that property entity are entitled to and should be accorded the benefit of the marital deduction.

[fol. 31]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EDWARD J. MEYER, MARION E. MEYER & ALFRED M. SAPERSTON, Executors of the Estate of ALBERT F. MEYER, 815 Liberty Bank Building, Buffalo, New York, Plaintiffs-Appellees,

v.

THE UNITED STATES OF AMERICA, Defendant-Appellant.

JUDGMENT—September 4, 1959

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed.

A. Daniel Fusaro, Clerk.

[fol. 32] [File endorsement omitted]

[fol. 33] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 34]

SUPREME COURT OF THE UNITED STATES

No. 539, October Term, 1959

EDWARD J. MEYER et al., Petitioners,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—January 11, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.